No.

in the

Supreme Court

of the

United States

ESKENDER GETACHEW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH MEDICI
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Chief
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTION PRESENTED

Both the Constitution (through the Fifth and Sixth Amendments) and the Federal Rules of Criminal Procedure (Rule 43) provide that a defendant "must be present" when the jury returns its verdict. If the defendant is absent, is the trial court under a duty to make some inquiry before proceeding to the verdict?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits these cases which are directly related to this Petition:

none

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The Petitioner, Eskender Getachew, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on November 3, 2025.

OPINION BELOW

The Sixth Circuit's opinion is published at 157 F.4th 833 and is attached as Appendix 1. The district court's oral ruling on Getachew's absence is contained in the trial transcript excerpt attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on November 3, 2025. This petition is timely filed. The Court's jurisdiction is invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the state and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rule of Criminal Procedure Rul 43 states in part:

> (a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, *the defendant must be present* at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) *every trial stage, including jury impanelment and the return of the verdict*; and

(3) sentencing.

STATEMENT OF THE CASE'

Dr. Eskander Getachew is an MD who practiced in the Columbus, Ohio area. In 2017, Dr. Getachew was operating two clinics: a neurology and sleep clinic, as well as a "wellness and recovery center" which treated those dealing with opioid addictions. In October 2017, Dr. Getachew applied for a license to operate an office based opioid treatment facility (OBOT) with the Ohio Board of Pharmacy. As part of the review for that license, the Board of Pharmacy performed an administrative investigation of Dr. Getachew's recovery center practice. That investigation eventually led to a criminal investigation, in which an undercover officer posed as a new patient and obtained controlled substances. The Government alleged that Getachew prescribed these substances, as well as others to other patients, outside the usual course of medical practice and without a legitimate medical purpose.

On April 28, 2022, an indictment was returned in the Southern District of Ohio charging Getachew with fifteen counts of unlawful distribution of a controlled substance by a physician, in violation of 21 U.S.C. § 841(a). Each count related to a specific prescription made by Getachew to a total of five patients from October 9, 2017 through November 6, 2018. Getachew was permitted to remain out on bond pending the trial. He faithfully attended all pretrial hearings.

Trial began on June 12, 2023, and lasted eight days. Getachew was present for all trial proceedings. On June 21, 2023, after the close of evidence, jury instructions,

and closing arguments, the jury deliberated and then retired for the day. They returned to deliberate on June 22. At 5:10pm, the court reconvened, informing the parties that the jury had returned a verdict. Dr. Getachew was not present when the court reconvened. The record does not reflect any reason for this absence. The court noted "[a]pparently didn't think it was important enough to be here for this. Has the jury reached a verdict?" and took the jury's verdict without Getachew present. (Appendix 2) The jury found Getachew guilty of counts one through eleven, but acquitted on counts twelve through fifteen. After the jury was dismissed, the court asked whether Getachew should be remanded into custody for failing to appear. Getachew's counsel clarified that he did not make clear to Getachew that he needed to remain at or near the courthouse while the jury deliberated. The court allowed Getachew to continue on bond pending sentencing.

On May 1, 2024, Getachew was sentenced to 6 months incarceration, to be followed by 3 years supervised release. He then appealed his conviction to the Sixth Circuit Court of Appeals, raising these issues:

1. The court should not have provided a "deliberate ignorance" instruction, and its inclusion in the jury instructions denied Getachew a fair trial.

2. The Government failed to prove that Getachew violated 21 U.S.C. § 841, as his knowing care of his patients did not fall outside the usual course of his professional practice.

3. The district court should not have taken the jury's verdict outside of Getachew's presence. This violated the Sixth Amendment, as well as FRCP Rule 43.

4. The district court erred in not holding an evidentiary hearing on Getachew's claim that he was denied the effective assistance of counsel during the plea offer process.

After hearing oral arguments, the Sixth Circuit denied this appeal on November 3, 2025. As to his right to be present claim, the Sixth Circuit determined:

> Dr. Getachew claims that this series of events violated his right to be present for "every trial stage, including . . . the return of the verdict." Fed. R. Crim. P. 43(a)(2). Because Dr. Getachew did not object below, plain-error review applies. We need not decide whether the district court committed error in receiving the verdict because Dr. Getachew cannot show that his absence affected his substantial rights. To succeed under this standard, a defendant must demonstrate "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer v. United States*, 593 U.S. 503, 507–08 (2021) (quotation omitted). Dr. Getachew cannot make that showing. By the time the jury returned to the courtroom, it had already reached a verdict, and there was no role for him to play with respect to the soon-to-be-delivered verdict. No evidence thus shows, or even suggests, that the defendant's absence had the potential to change the verdict. See *Rice v. Wood*, 77 F.3d 1138, 1143–45 (9th Cir. 1996) (en banc). Dr. Getachew responds with a concern that such a conclusion will "hollow" out defendants' right to be present for critical stages of trial, giving courts discretion to do away with the right "in the name of expediency." Reply Br. 15. Not so. If a defendant wants to preserve his right to attend trial, he just has to show up. And if a situation of involuntary absence arises—such as a hospitalization, see *United States v. Novaton*, 271 F.3d 968, 996–97 (11th Cir. 2001)—a timely objection will preserve the defendant's right to be present. No plain error occurred.
>
> (Appendix 1, pp.9-10)

REASONS FOR GRANTING THE WRIT

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970). Getachew was not present when the jury returned its guilty verdicts against him. This violated his right to be present as guaranteed by the Sixth Amendment, Fifth Amendment, and Federal Rule of Criminal Procedure Rule 43. The Sixth Circuit sidestepped this constitutional problem by finding that, because Getachew's absence had no "potential to change the verdict," he could not prove prejudice from the error. This finding is contrary to the structural and institutional nature of the error. Further, absent evidence that the trial court sought to determine why Getachew was not present for the verdict, the error required reversal. The Sixth Circuit's findings as to both the lack of a need for an inquiry into a defendant's absence from trial, as well as the prejudicial nature of such absence, are contrary to every other circuit to address this issue.

A. Getachew had both a constitutional and statutory right to be present during the verdict

Getachew had a right to be present, in open court, at the time that the jury returned its' guilty verdict against him. "[T]he right to personal presence at all

critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 455, 78 L. Ed. 2d 267 (1983). "The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment [ ], but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed. 2d 486 (1985). As the Tenth Circuit has put it, the right to be present "at summations, jury instructions, and the return of the jury verdict" is "without qualification." *Larson v. Tansy*, 911 F.2d 392, 394 (10th Cir. 1990).

This constitutional right is also protected by the Federal Rules of Criminal Procedure. Rule 43 states "[u]nless this rule, Rule 5 , or Rule 10 provides otherwise, the defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury empanelment and the return of the verdict; and (3) sentencing." "Rule 43 requires that the defendant be present, which simply cannot be satisfied by anything less than physical presence in the courtroom." *United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011). "In framing rule 43, Congress explicitly intended to codify existing law concerning an accused's constitutional and common law rights of presence at trial. [ ] Thus rule 43 encompasses the protections afforded by the sixth amendment confrontation clause,

the due process clause of the fifth amendment, and the common law right of presence." *United States v. Reiter*, 897 F.2d 639, 642 (2d Cir. 1990).

Getachew's right to be present at the time the jury returned its verdict was thus protected by both the Constitution and the Federal Rule of Criminal Procedure. The district court's decision to take the verdict in Getachew's absence, without inquiring as to why Getachew was not present, is constitutional error.

B. The trial court had a duty to determine whether Getachew's absence was "voluntary", and the Sixth Circuit's determination to the contrary creates a circuit split

FRCP Rule 43(c) envisions that a defendant may waive his presence at a critical stage of trial under two circumstances: when the defendant through their disruptive actions warrants removal, or when the defendant "voluntarily absents" themselves from the case. The Sixth Circuit determined that because Getachew was not present when the jury stated it had come to a verdict, he had voluntarily waived his absence. But the district court made no inquiry as to whether Getachew was "volunteering" to be absent – instead, the court was told Getachew was not in the courthouse, and then stated "[a]pparently didn't think it was important enough to be here for this. Has the jury reached a verdict?" This was insufficient as a matter of law to determine that Getachew had voluntarily waived his presence. The Sixth Circuit's finding, that no further inquiry need occur, conflicts with other circuits to have addressed this issue.

A defendant's rights, even constitutional ones, may be waived, so long as the waiver is knowing and voluntary. *Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321 (1993). Any such waiver must be "the product of a free and deliberate choice." *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010). The Government bears the burden of proving that a defendant has waived a constitutional right. *United States v. Medina-Carrasco*, 815 F.3d 457, 464 (9th Cir. 2016). "There is a presumption against the waiver of constitutional rights." *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S. Ct. 1245, 1247, 16 L. Ed. 2d 314 (1966).

These general rules apply to the determination of whether a defendant has voluntarily absented himself from trial. Every circuit to address the issue (except the Sixth here) has determined that a trial court must make some inquiry to determine the reason for defendant's absence before proceeding in their absence. Consider first the Second Circuit, who have held that "[t]he district court 'must vigorously safeguard a criminal defendant's right to be present.'" *United States v. Yannai*, 791 F.3d 226, 240 (2d Cir. 2015). "When the issue is whether the defendant has waived his right to be present at a critical stage of the criminal proceedings by absenting himself, the district court ordinarily must conduct an inquiry on the record to determine whether the defendant has a sound excuse for his absence[ ] , or whether instead the defendant's 'absence ... was, in fact, knowing and voluntary.'" *Id.*

In accord with the Second Circuit, the Fifth Circuit has determined "the right of a criminally accused to be present at [her] trial cannot cursorily, and without inquiry, be deemed by the trial court to have been waived simply because the accused is not present when [she] should have been. . . [ ] The trial judge must inquire into the reason for the defendant's absence and determine whether it constitutes a voluntary waiver of the right to be present." *United States v. Davis*, 61 F.3d 291, 302 (5th Cir. 1995)(internal citation omitted).

The Seventh Circuit has explicitly held "[b]efore proceeding, the district court must explore on the record any 'serious questions' raised about whether the defendant's absence was knowing and voluntary." *United States v. Achbani*, 507 F.3d 598, 601–02 (7th Cir. 2007). Similarly, the Eighth Circuit has held "[i]n deciding whether to try a defendant in absentia, the district court must make factual findings to determine whether a defendant's absence is knowing and voluntary and, if so, whether the public interest in proceeding with trial clearly outweighs the interests of the voluntarily absent defendant in attending his trial. [ ]. The district court should, 'at the time make a record inquiry to attempt to ascertain the explanation for the absence of the accused.'" *United States v. St. James*, 415 F.3d 800, 803–04 (8th Cir. 2005).

The Tenth Circuit's rule on this is also clear: "a defendant's right to be present cannot cursorily, and without inquiry, be deemed by the trial court to have been

waived." *United States v. Cervantes*, 4 F.4th 1089, 1096 (10th Cir. 2021). Finally, the Eleventh Circuit has taken a position that a defendant's silence could waive the right to be present, but only after his rights were explained to him, thus making his silence a "decision" to be absent. *United States v. Sterling*, 738 F.3d 228, 236 (11th Cir. 2013)("the court did not err in proceeding without Sterling once his rights were explained to him. Accordingly, Sterling voluntarily and permissibly waived his right to be present at trial, and no error, harmless or otherwise, occurred.").

The Sixth Circuit's decision conflicts with each of the above. The Court determined that "[i]f a defendant wants to preserve his right to attend trial, he just has to show up. And if a situation of involuntary absence arises—such as a hospitalization, [ ]—a timely objection will preserve the defendant's right to be present." This is far afield from the functional inquiry demanded by every other circuit. The majority opinion is the right one, and works to preserve a defendant's ability to be present during his or her trial. Because the Constitution and Rule 43 both guarantee the right to be present at critical stages of the trial, any waiver of that right requires an inquiry by the trial court to ensure that the waiver is a voluntary choice.

Getachew agrees that "a criminal defendant should not be able to halt the administration of justice by fleeing after the start of a non-capital trial that began in his presence." *United States v. Howell*, 24 F.4th 1138, 1142 (7th Cir. 2022). But that

is not what occurred here. In fact, Getachew arrived at the courthouse shortly after the court took the jury verdict. This is further strong evidence that not only was Getachew not seeking to be absent, but that, had the court made an inquiry, the result would have been different.

Both the Constitution and Federal Rule 43(c) require a district court to make an inquiry before finding that a defendant has voluntarily absented himself from trial. The Sixth Circuit's holding, that no such inquiry is necessary, is not only wrong but creates a circuit conflict which this Court must resolve.

C. The Sixth Circuit misinterpreted the harmless error standard as it applies to the right to be present

The Sixth Circuit's determination, that because Getachew's counsel did not raise a contemporaneous objection to his client's absence reversible error turned on whether Getachew's presence would have made a difference in the jury's verdict (Appendix 1, p.10), is wrong and misunderstands this Court's plain-error analysis.

An argument not raised in the trial court, but only raised for the first time on appellate review, is reviewed for "plain error." *Davis v. United States*, 589 U.S. 345, 347, 140 S. Ct. 1060, 1061, 206 L. Ed. 2d 371 (2020). "To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements. [ ] First, there must be an error. Second, the error must be plain. Third, the error must affect 'substantial rights,' which generally means that there must be 'a reasonable

probability that, but for the error, the outcome of the proceeding would have been different.' [ ] If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Greer v. United States*, 593 U.S. 503, 507–08, 141 S. Ct. 2090, 2096–97, 210 L. Ed. 2d 121 (2021).

Getachew does concede that his counsel failed to object to the court proceeding in his absence. But as outlined above, the district court proceeding without Getachew being present, and without asking whether Getachew's absence was voluntary, was error. The error was also plain – Rule 43 and the Constitutional jurisprudence on the issue of a criminal defendant's presence at trial for critical stages is clear. Therefore, this issue turned on whether Getachew's "substantial rights" were violated, and whether the "public reputation" of the proceedings suffered as a result.

The unique facts here make plain-error analysis an ill fit for review. The district court was aware of two facts at the time it chose to proceed with the verdict: first, that Getachew was in fact absent, and second, that both the Constitution and the Rules of Criminal Procedure demanded his presence at this critical stage of the proceedings. Of course, "[a] criminal defendant who wishes a court of appeals to consider a claim that a ruling of a trial court was in error must first make his objection known to the trial-court judge." *Holguin-Hernandez v. United States*, 589

U.S. 169, 170, 140 S. Ct. 762, 764, 206 L. Ed. 2d 95 (2020). The reason for this rule is straight forward – the trial court should have a chance to consider and correct its own error. See *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013); *United States v. Hernandez-Martinez*, 485 F.3d 270, 272 (5th Cir. 2007). But here, there was no need to bring to the court's attention what they already knew. Thus, the protections afforded by the trial court by the plain-error rule are an awkward fit to this particular situation.1

Further, the Sixth Circuit's focus on whether Getachew's presence would have changed the jury's verdict in analyzing the loss of "substantial rights" misses the mark. As this Court found in *Rosales-Mireles v. United States*, 585 U.S. 129, 137, 138 S. Ct. 1897, 1906, 201 L. Ed. 2d 376 (2018), "[b]y focusing instead on principles of fairness, integrity, and public reputation, the Court recognized a broader category of errors that warrant correction on plain-error review." And this Court noted in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), "[w]e need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial' . . . [t]here may be a special category of forfeited errors

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1 This Court has also recognized the authority to use its supervisory powers to "circumvent the obligation to assess trial errors for their prejudicial effect." *Nguyen v. United States*, 539 U.S. 69, 81, 123 S. Ct. 2130, 2137, 156 L. Ed. 2d 64 (2003)(overturning appellate decision despite no objection to the appellate panel composition).

that can be corrected regardless of their effect on the outcome . . . . we have never held that a Rule 52(b) remedy is only warranted in cases of actual innocence." 507 U.S. at 735-6. The loss of substantial rights is the critical right to be present during the jury's return of verdict. Of all the critical stages of a criminal proceeding, there is none more important. While the Sixth Circuit found that the jury's die was cast, and that no difference could be made by Getachew's presence, this is not so. Any one of the jury members, when faced with the actual moment of passing judgment on Getachew, may have changed their mind when looking him in the eye. "The purpose of insisting on defendant's presence is to ensure that defendant can assist his counsel, and that he, by his presence in front of the jury, can act as a psychological brake on its deliberations." *United States v. Brika*, 416 F.3d 514, 527 (6th Cir. 2005). It is precisely why this point in the trial is so critical – our criminal system's bedrock is this moment in the criminal process. To hold that it doesn't make a difference is a fundamental misunderstanding of the process itself.

And this error affected "the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 1429, 173 L. Ed. 2d 266 (2009). Allowing a jury to render a verdict in a criminal case in the defendant's absence, without determining whether the defendant was voluntarily or involuntarily absent, is a breakdown in the criminal process itself. "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode

prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." *Hopt v. People*, 110 U.S. 574, 579, 4 S. Ct. 202, 204, 28 L. Ed. 262 (1884) (citing *Blackstone*, 4 Bl. Comm. 11).

Finally, this right is so fundamental that this Court should find that this error is structural. When a defendant raises a constitutional error for the first time on direct review, this Court has "divided constitutional errors into two classes": trial errors and structural defects. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557,----, 165 L. Ed. 2d 409 (2006). Trial errors occur during the presentation of the case to the jury "and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' " 548 U.S. at 148. Most constitutional errors fall under this umbrella. However, "[s]tructural errors are errors that affect the 'entire conduct of the [proceeding] from beginning to end. [ ] The 'highly exceptional' category of structural errors includes, for example, the 'denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt.'" *Greer* at 593 U.S. 513. As this Court determined in *Gonzalez-Lopez*, structural errors effect the integrity of the proceedings such that actual prejudice may be difficult to discern. In *Gonzalez-*

Lopez, the Court reviewed the deprivation of chosen counsel at a critical stage in the proceedings. The Court noted that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." 548 U.S. at 150. Thus, harmless error analysis cannot apply to such structural errors. *Id.* at 152.

The Sixth Circuit's reasoning points out why this type of error lends itself to structural error. One cannot determine with precision what would or would not have happened had Getachew been present at the rendering of the verdict – the jury never faced having to pass judgment on their peer in his presence. This is precisely the type of error that "affects the framework in which the trial proceeds." *Robert Leroy Mccoy v. Louisiana*, 584 U.S. 414, 427, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821 (2018).

Indeed, at least two circuits have held that an absence from the courtroom is the type of "per se" reversible error that does not require a showing of prejudice. In *United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002), the Tenth Circuit held "Rule 43 vindicates a central principle of the criminal justice system, violation

of which is per se prejudicial. In that light, presence or absence of prejudice is not a factor in judging the violation." *Id.* at 1248. The Seventh Circuit has also labeled Rule 43 violations "per se errors," which defies harmless error analysis. *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018), amendment by CARES Act recognized in *United States v. Navarrete*, 88 F.4th 672 (7th Cir. 2023).

In sum, the Sixth Circuit's analysis of the effect of this constitutional violation was lacking and did not follow this Court's precedents. It also conflicts with every other circuit to address this issue. This Court should grant certiorari, and reverse the Sixth Circuit's determination.

CONCLUSION

Getachew requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for a new trial.

Respectfully submitted,

JOSEPH MEDICI
Federal Public Defender

Kevin M. Schad
Appellate Chief
Office of the Federal Public Defender
Southern District of Ohio
Appellate Chief
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

APPENDIX

1. COURT OF APPEALS ORDER November 3, 2025
2. DISTRICT COURT Transcript Excerpt June 22, 2023

Appendix 1

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0299p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESKENDER GETACHEW,

Defendant-Appellant.

No. 24-3432

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 2:22-cr-00068-1—Michael H. Watson, District Judge.

Argued: October 23, 2025

Decided and Filed: November 3, 2025

Before: SUTTON, Chief Judge; CLAY and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. Sofia M. Vickery, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. Sofia M. Vickery, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

SUTTON, Chief Judge. Eskender Getachew is a medical doctor who operated a clinic in Columbus, Ohio, that provided treatment to patients suffering from opioid addiction. The federal government alleged that Dr. Getachew unlawfully prescribed controlled substances, including

opioids, without a legitimate medical purpose. After a seven-day trial, a jury convicted him. Dr. Getachew challenges his conviction on several grounds. We affirm.

I.

"The opioid epidemic represents one of the largest public health crises in this nation's history." *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024) (quotation omitted). Over the last three decades, opioid overdoses have taken the lives of hundreds of thousands of Americans, *see id.*, rendering the medical treatment of opioid addiction a public-health necessity.

One of the key medicines employed to treat opioid addiction is itself an opioid. The drug, buprenorphine, functions by partially activating specific receptors in the brain, satisfying an addict's cravings without giving him a high. The drug allows a patient to avoid painful withdrawal symptoms while focusing on recovery. But buprenorphine must be taken properly to work. If a patient dilutes buprenorphine and injects it directly into his bloodstream, it can produce a significant high.

To prevent this kind of abuse, medical guidelines advise addiction doctors to prescribe a combination drug sold under the brand name Suboxone. Suboxone combines buprenorphine with naloxone, an overdose-reversing medication. The naloxone acts as a blocking agent, preventing patients from getting a high even if they attempt to abuse the buprenorphine. Addiction doctors employ Suboxone in this way to help their patients reduce cravings and avoid withdrawal symptoms, all while minimizing the risk of abuse.

Some patients, unfortunately, suffer from naloxone allergies and may not safely take Suboxone. In those circumstances, addiction doctors prescribe a different drug called Subutex, which contains pure buprenorphine and no naloxone. Naloxone allergies are "exceedingly rare," R.79 at 76, and addicts have strong incentives to falsely claim an allergy to obtain Subutex. Subutex is not only much easier to abuse than Suboxone, but it also has a much higher street value. Medical guidelines direct doctors to verify any claimed allergy before prescribing Subutex.

Dr. Getachew operated a medical clinic that provides these treatments. Like other addiction doctors, Dr. Getachew employed Suboxone to treat many of his patients. Less like other doctors, he liberally prescribed Subutex too. Before his arrest, Dr. Getachew was prescribing Subutex to 40–50% of his patients, an "astronomically high" level given the rarity of naloxone allergies. R.78 at 84. At one point, pharmaceutical representatives expressed concern to Dr. Getachew that his clinic accounted for a "very high percentage" of all patients nationwide claiming a naloxone allergy. R.78 at 117–18. Alarmed pharmacists called Dr. Getachew's office with reports that his patients requested specific colors or brands of pills, a "red flag" that patients were maximizing the street value of their prescription drugs. R.78 at 118–19, 128.

Authorities caught wind of these irregularities in 2017 when Dr. Getachew applied for a state license for his clinic. Upon reviewing his application and realizing the frequency with which he prescribed Subutex, they opened a criminal investigation.

A federal grand jury returned an indictment charging Dr. Getachew with fifteen counts of unlawful distribution of a controlled substance by a physician. *See* 21 U.S.C. § 841(a). His trial lasted seven days. The jury heard from five government witnesses, including an undercover police officer who visited the clinic posing as a patient, a former clinic employee, a former patient, and an expert who analyzed the clinic's medical records for deviations from the medical standard of care.

The trial revealed several instances in which Dr. Getachew wrote prescriptions inconsistent with standard medical practice. The doctor, as one example, prescribed Subutex to a patient on account of a naloxone allergy, yet the patient's medical record offered no documentation of the allergy. What's more, the medical record indicated that the patient's urine consistently tested positive for naloxone despite the claimed allergy, a result that a handwritten margin note called "highly suspect!" R.79 at 131–32. Dr. Getachew nonetheless continued to prescribe Subutex to the patient. The government's evidence showed a similar pattern for other patients. Despite aberrant drug test results and even reports to the clinic that a patient sold his pills, Dr. Getachew continued signing prescriptions.

The jury found Dr. Getachew guilty on eleven counts and not guilty on four others. The court imposed concurrent sentences of six months for each guilty count, as well as three years of supervised release.

II.

On appeal, Dr. Getachew challenges his conviction in five ways.

Sufficiency of the evidence. Dr. Getachew contends that the government failed to prove that he knew his prescriptions were unauthorized. Because Dr. Getachew did not move for acquittal at the close of evidence, his challenge fails unless his conviction represents a "manifest miscarriage of justice." *United States v. Sherer*, 770 F.3d 407, 411 (6th Cir. 2014) (quotation omitted). That means the record must be "devoid of evidence pointing to guilt." *Id.* (quotation omitted). In making this determination, we view the evidence in the light most favorable to the government. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To prove its case, the government had to establish that Dr. Getachew distributed controlled substances without authorization, namely without a legitimate medical purpose and outside the usual course of medical practice. *See* 21 U.S.C. § 822(b); 21 C.F.R. § 1306.04(a). The government also had to prove that Dr. Getachew either knew or intended his conduct to be unauthorized. *Ruan v. United States*, 597 U.S. 450, 457 (2022). A jury may rely on direct or circumstantial evidence to find that a defendant doctor knew a prescription lacked authorization. *See United States v. Bauer*, 82 F.4th 522, 529 (6th Cir. 2023).

The evidence sufficed to find these elements of the crime. The record contained "ample circumstantial evidence" from which the jury could "infer . . . subjective knowledge of unauthorized distribution." *Id.* Dr. Getachew routinely violated the standard of care described by the government's medical expert. And the jury could reasonably conclude that repeated and brazen violations of medical norms don't happen by mistake.

The record is replete with evidence that supports that inference. Dr. Getachew regularly prescribed drugs to patients who had no documented need for them. The doctor, in one instance, prescribed Suboxone to an undercover agent posing as a patient, even though the agent used

synthetic urine in each of her drug screenings, meaning that none of her drug tests showed any signs of her claimed oxycodone addiction. Dr. Getachew also prescribed Subutex to several patients without any supporting documentation for their claimed naloxone allergies, and continued prescribing Subutex to one of them after the "highly suspect!" test result showed that the patient had taken naloxone. R.79 at 131–32.

The evidence also permits the inference that Dr. Getachew routinely failed to examine his patients. The medical charts for every patient named in the indictment contained identical examination notes for every appointment. Worse, the notes for all named male patients contained verbatim language about supposed observations of the patients' menstrual cycles, a giveaway of the copy-and-paste makeweight of the notes.

Dr. Getachew continued issuing prescriptions despite significant red flags that patients diverted their medications. At one point, for example, the clinic received a report that one of Dr. Getachew's patients sold his prescribed medications. The report is recorded in the patient's chart. But Dr. Getachew never stopped signing the patient's prescriptions.

In view of "the compounding of this circumstantial evidence," no miscarriage of justice occurred when the jury found that Dr. Getachew "*knew* his prescriptions were without authorization." *Bauer*, 82 F.4th at 529. The sufficiency challenge fails.

Dr. Getachew responds that the record contains "overwhelming evidence" that he ran "a thoughtful, careful practice and did not intentionally break any law." Reply Br. 7–8. But our role is not to reweigh the evidence. When we view the evidence in the light most favorable to the government, as we must, it becomes clear that no manifest miscarriage of justice occurred. Dr. Getachew's other virtues as a physician "cannot overcome the force of the Government's presentation, especially under this deferential standard of review." *Sherer*, 770 F.3d at 412.

Deliberate-ignorance instruction. Dr. Getachew contends that the district court erred when it gave a deliberate-ignorance jury instruction. Because Dr. Getachew challenges the instruction on a ground he did not raise below, plain-error review applies. Fed. R. Crim. P. 30(d), 52(b); *see United States v. You*, 74 F.4th 378, 391 (6th Cir. 2023). Under that standard, we may reverse "only if there is (1) an error (2) that is plain, (3) that affected the party's

substantial rights, and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Henry*, 797 F.3d 371, 374 (6th Cir. 2015) (quotation omitted).

A deliberate-ignorance instruction prevents a defendant from avoiding criminal liability by purposely "closing his eyes to the obvious." *United States v. Stanton*, 103 F.4th 1204, 1212 (6th Cir. 2024). In cases like this one, the instruction "prevents clinic owners and providers from claiming a lack of knowledge of illegal operations despite awareness of serial red flags." *Id.* at 1213. A district court, we have explained, should give this instruction "sparingly" and only when "the defendant claims to lack guilty knowledge and the evidence would support an inference of deliberate ignorance." *United States v. Agrawal*, 97 F.4th 421, 434 (6th Cir. 2024) (quotation omitted).

There is room for debate over whether the court should have given a deliberate-ignorance instruction. On the one hand, Dr. Getachew's primary defense at trial was that he "issued all" the prescriptions "for a legitimate medical purpose," not that he was kept in the dark by co-conspirators or patients. R.82 at 207 (defense expert testimony). On the other hand, Dr. Getachew consistently argued that he didn't know he was issuing unauthorized prescriptions. Dr. Getachew's counsel returned to this theme in both his opening and closing arguments, insisting that the jury needed to decide whether Dr. Getachew "[knew] what he was doing was wrong." R.83 at 26 (closing argument); *accord* R.78 at 47 (opening argument). We hesitate to say that the district court erred—let alone plainly erred—in giving a deliberate-ignorance instruction when Dr. Getachew repeatedly put his own knowledge at issue.

Either way, we need not decide whether the court erred in giving the instruction, as the instruction did not affect Dr. Getachew's substantial rights. "[W]hen a court tells a jury that it may convict a defendant based on either the defendant's actual knowledge or the defendant's deliberate ignorance, courts will find any sufficiency-of-the-evidence problems with the deliberate-ignorance instruction harmless if sufficient evidence showed the defendant's actual knowledge." *Agrawal*, 97 F.4th at 434. As discussed, the government "presented enough evidence to support a conviction based on the defendant's actual knowledge (as opposed to the

defendant's deliberate ignorance)." *Id.* (quotation omitted). Any error thus did not affect Dr. Getachew's substantial rights.

Dr. Getachew responds that plain-error review does not apply. Because he objected to the deliberate-ignorance instruction on another ground, he contends that the district court had the opportunity to correct the error. But an objection to an instruction on one ground does not suffice to preserve an argument on appeal on another ground. To avoid plain-error review, a party must inform the district court of the party's "specific objection" and the "grounds" for that objection. Fed. R. Crim. P. 30(d).

Dr. Getachew's written objection to the deliberate-ignorance instruction falls short. In its entirety, his objection read: "I object to this instruction. I believe it is not warranted under *Ruan*. I believe it is inconsistent with *Ruan*." R.41 at 44. Dr. Getachew's counsel also orally raised the objection but did not articulate any additional arguments in its support, maintaining only that a deliberate-ignorance instruction does not satisfy *Ruan*'s requirement that the government prove a defendant doctor's subjective knowledge that his conduct lacked authorization. Dr. Getachew never mentioned any concern, now the focus of this appeal, about the evidentiary foundation for the instruction. On this record, plain-error review applies.

Content of deliberate-ignorance instruction. Dr. Getachew separately contends that the deliberate-ignorance instruction misstated the law. Plain-error review again applies because, as the doctor concedes, he did not argue the point below. Reply Br. 4; *see* Fed. R. Crim. P. 30(d), 52(b).

The district court did not err, plainly or otherwise, in crafting this instruction. We have "repeatedly described" our pattern deliberate-ignorance instruction "as an accurate statement of the law." *Agrawal*, 97 F.4th at 435 (quotation omitted); *see, e.g.*, *United States v. Daneshvar*, 925 F.3d 766, 782 n.5 (6th Cir. 2019) (collecting cases). The instruction in this case closely mirrored the pattern instruction. *Compare* R.83 at 76–77, *with* Sixth Circuit Pattern Jury Instruction 2.09 (2025). No error occurred.

In resisting this conclusion, Dr. Getachew claims that the pattern instruction contains an error that our cases have overlooked. His argument relies entirely on a single word in the

instruction and a single sentence in one of our opinions. The instruction cautions the jury that "[c]arelessness or negligence or *foolishness*" on the part of the defendant "is not the same as knowledge and is not enough to convict." R.83 at 77 (emphasis added). Dr. Getachew contends that the instruction misstates the law when it mentions foolishness. The basis of his argument is a single line from one of our cases, *United States v. Stanton*: "A deliberate ignorance instruction satisfies *Ruan* when, as here, it reminds the jury that this standard sits well above carelessness, negligence, and *mistake*." 103 F.4th at 1213 (emphasis added). Claiming that "mistake" and "foolishness" have different connotations, Dr. Getachew maintains that the instruction deviates from our caselaw.

This argument faces two problems. First, we are not convinced that "mistake" and "foolishness" describe meaningfully different concepts in this context. Both words describe a lack of judgment. Inserting either word into the pattern instruction ensures that a jury knows not to convict a defendant merely because he is a fool or a mistake-prone individual. That insistence on subjective knowledge, rather than generally poor judgment, suffices to satisfy *Ruan*.

Second, *Stanton* does not support Dr. Getachew's argument. *Stanton* held that the deliberate-ignorance instruction in that case sufficiently reminded the jury not to convict the defendant for mere "carelessness, negligence, [or] mistake." *Id.* But the *Stanton* jury instruction itself used the exact same "carelessness or negligence or foolishness" language to which Dr. Getachew objects. Jury Instructions at 22, *United States v. Stanton*, 103 F.4th 1204 (6th Cir. 2024) (No. 241). What's more, the single sentence from *Stanton* upon which Dr. Getachew relies precedes citations to two cases, each of which upheld a jury instruction containing the word "foolishness." *United States v. Anderson*, 67 F.4th 755, 766 (6th Cir. 2023); *United States v. Hofstetter*, 80 F.4th 725, 731 (6th Cir. 2023). Even the cases cited by Dr. Getachew, in short, permit the "foolishness" formulation.

"[T]he language of an opinion," it is worth remembering, "is not always to be parsed as though we were dealing with the language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (quotation omitted). So it is here. An overreading of a single word in a single case does not establish plain error.

Presence at return of verdict. Dr. Getachew claims that the district court violated his right to be present for delivery of the verdict. *See* Fed. R. Crim. P. 43(a)(2). After hearing the evidence, the jury deliberated for a day and a half. When the district judge reconvened to receive the verdict, counsel for the government and the defense were present in the courtroom. But Dr. Getachew was not. Noticing Dr. Getachew's empty chair, the judge remarked that Dr. Getachew "[a]pparently didn't think it was important enough to be here for this." R.84 at 3. The jury handed down the verdict, the judge polled each juror, and the court excused the jury. Defense counsel did not object to or explain Dr. Getachew's absence.

After the jury left, defense counsel told the judge that Dr. Getachew's absence was "my fault." R.84 at 7. Dr. Getachew eventually appeared in the courtroom around 25 minutes later. Defense counsel explained that he advised Dr. Getachew that he could leave the courthouse during deliberations: "In my experience, usually, we don't have to stay in the courthouse, but we have to be close by. And I was not clear with my client that he should be close by and waiting for the deliberations." R.84 at 7. At no point did counsel or Dr. Getachew raise an objection.

Dr. Getachew claims that this series of events violated his right to be present for "every trial stage, including . . . the return of the verdict." Fed. R. Crim. P. 43(a)(2). Because Dr. Getachew did not object below, plain-error review applies.

We need not decide whether the district court committed error in receiving the verdict because Dr. Getachew cannot show that his absence affected his substantial rights. To succeed under this standard, a defendant must demonstrate "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer v. United States*, 593 U.S. 503, 507–08 (2021) (quotation omitted). Dr. Getachew cannot make that showing. By the time the jury returned to the courtroom, it had already reached a verdict, and there was no role for him to play with respect to the soon-to-be-delivered verdict. No evidence thus shows, or even suggests, that the defendant's absence had the potential to change the verdict. *See Rice v. Wood*, 77 F.3d 1138, 1143–45 (9th Cir. 1996) (en banc).

Dr. Getachew responds with a concern that such a conclusion will "hollow" out defendants' right to be present for critical stages of trial, giving courts discretion to do away

with the right "in the name of expediency." Reply Br. 15. Not so. If a defendant wants to preserve his right to attend trial, he just has to show up. And if a situation of involuntary absence arises—such as a hospitalization, *see United States v. Novaton*, 271 F.3d 968, 996–97 (11th Cir. 2001)—a timely objection will preserve the defendant's right to be present. No plain error occurred.

Evidentiary hearing. Dr. Getachew challenges the district court's failure to hold an evidentiary hearing on his motion for a new trial. About six weeks before trial, the government offered Dr. Getachew a plea deal. If Dr. Getachew pleaded guilty to one count of unlawful distribution, the government would dismiss all remaining counts, agree to a guidelines advisory range of zero to six months' imprisonment, and recommend a sentence of probation.

Dr. Getachew's counsel relayed that offer to the doctor and his family via email. Counsel explained that, although the plea would likely result in probation, the sentence would ultimately be "in the hands of the judge," who could sentence Dr. Getachew to up to "10 years in prison" under the deal. R.89-1 at 1. If, on the other hand, Dr. Getachew rejected the deal and a jury found him guilty on all counts, his counsel explained that he "could receive a sentence that would essentially place you in prison for the remainder of your life"—up to "10 years per count." R.89-1 at 1. Counsel said that he was "cautiously optimistic about our case" but could not "guarantee that [Dr. Getachew] will not be convicted of any counts in the indictment." R.89-1 at 1. He encouraged the doctor to consider a guilty plea's effect on his collateral matter pending before the state medical board, and he reiterated that "[i]t is your life, and thus, your decision." R.89-1 at 1.

Although Dr. Getachew responded with interest in setting up a conference call between his family and the attorney, a call never occurred. The next week, Dr. Getachew texted his counsel to reject the plea deal, as he was "not going to accept what I did not do." R.89-3 at 2. The case proceeded to trial.

A few weeks after the jury returned its verdict, Dr. Getachew ended his relationship with his trial counsel. Represented by new attorneys, Dr. Getachew moved for a new trial, arguing that trial counsel had rendered ineffective assistance of counsel "in the plea negotiation stage."

R.89 at 1. Dr. Getachew attached a copy of trial counsel's email to his motion. In his reply brief, Dr. Getachew requested an evidentiary hearing. The district court refused to hold one and denied his motion.

On appeal, Dr. Getachew challenges the district court's denial of an evidentiary hearing. "Whether to hold an evidentiary hearing before deciding a motion for a new trial is within the discretion of the trial court." *United States v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006). We thus review the district court's denial for abuse of discretion. *See United States v. Anderson*, 76 F.3d 685, 692 (6th Cir. 1996).

A district court does not abuse its discretion in denying a request for an evidentiary hearing when the defendant "fail[s] to proffer any evidence that his trial counsel rendered ineffective assistance." *Bass*, 460 F.3d at 838. A defendant must "produce at least a modicum of evidence in support of a request for an evidentiary hearing on a motion for a new trial based on ineffective assistance of counsel." *United States v. Allen*, 254 F. App'x 475, 478 (6th Cir. 2007).

Dr. Getachew failed to produce any evidence of unconstitutional assistance. The doctor needed to prove that his counsel's performance was objectively deficient, and that the deficiency prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But he did not produce any evidence in support of either proposition.

As to performance, the evidence undermined rather than supported his argument. The submitted email showed that counsel thoroughly described the consequences of accepting the plea as well as the risks of going to trial. Dr. Getachew did not provide any evidence about why a follow-up phone call was constitutionally necessary after this comprehensive email. All that Dr. Getachew's evidence showed was that he "received all the information needed to make an informed decision on whether to accept the plea deal from his counsel." *Logan v. United States*, 910 F.3d 864, 871 (6th Cir. 2018).

As to prejudice, Dr. Getachew "never assert[ed] in his moving papers that he would have accepted the plea offer had his counsel done anything differently." R.97 at 8. Dr. Getachew thus did not produce any evidence that the purported ineffectiveness prejudiced him.

Dr. Getachew resists this conclusion on the ground that this approach flips the applicable legal standard. In support, he invokes cases stating that district courts must hold an evidentiary hearing "unless the record conclusively shows that the petitioner is entitled to no relief." *Villa v. United States*, 56 F.4th 417, 420 (6th Cir. 2023) (quotation omitted); *see also Monea v. United States*, 914 F.3d 414, 422 (6th Cir. 2019). All of this shows, he maintains, that we should be looking to whether the record affirmatively forecloses his claim, not to whether he produced any evidence to support his claim.

But the cases Dr. Getachew cites do not apply in the context of a motion for a new trial. The cases instead arise out of motions to vacate under 28 U.S.C. § 2255. That statute requires a court to "grant a prompt hearing" unless "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Dr. Getachew does not offer any basis or authority for applying § 2255's legal standard to a motion for a new trial.

Because Dr. Getachew did not produce any evidence of ineffective performance or prejudice, the district court did not abuse its discretion in denying his request for an evidentiary hearing. Dr. Getachew's challenge fails.

We affirm.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Appendix 2

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	CASE NO. 2:22-cr-68
	)	
vs.	)	Volume VIII
	)	
ESKENDER GETACHEW,	)	
	)	
DEFENDANT.	)	
	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE MICHAEL H. WATSON
THURSDAY, JUNE 22, 2023; 9:00 A.M.
COLUMBUS, OHIO

FOR THE PLAINTIFF:
U.S. Department of Justice
By: Timothy Landry
Samantha E. Stagias
Assistant United States Attorneys
1400 New York Avenue, NW
Washington, District of Columbia 20005

FOR THE DEFENDANT:
By: Mark S. O'Brien, Esq.
3091 Mayfield Road, Suite 320
University Heights, Ohio 44118

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Proceedings recorded by mechanical stenography, transcript produced by computer.

LAHANA DUFOUR, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER
85 MARCONI BOULEVARD
COLUMBUS, OHIO 43215
614-719-3286

Thursday Morning Session

June 22, 2023

- - -

(Jurors continued deliberations on the case beginning at 9:00 a.m.)

- - -

Thursday Afternoon Session

June 22, 2023.

- - -

THE COURT: So they have a question. It reads: Need 218, 219, digital OARRS for KC. USB does not have it on it.

218 and 219 have not been admitted.

THE LAW CLERK: Yes, they have. The OARRS reports were not admitted.

THE COURT: The OARRS reports are not admitted which are 16 and 17.

MS. STAGIAS: So they're asking for --

THE COURT: They're asking for the digital OARRS report for KD.

THE LAW CLERK: But the question assumes that the digital OARRS report is Exhibits 218 and 219 when our notes reflect that Exhibits 218 and 219 are two prescriptions which have been admitted. And our notes reflect that the digital OARRS report is actually Exhibit 216 and maybe 217 and was not admitted.

MS. STAGIAS: There shouldn't be two OARRS.

THE LAW CLERK: There's one that says KD OARRS and one that says KD OARRS updated. And those were not admitted. So if it is indeed the OARRS --

THE COURT: So my intention is to tell them that those OARRS reports were not admitted into evidence. Any objection to that? Any other proposed response?

I can tell you that they appear to be working very diligently through the evidence. So that's good.

MR. O'BRIEN: You can probably suggest to them that there are OARRS reports in the patient files but they're not complete.

THE COURT: 218 and 219 are the prescriptions that have been admitted for Dextro and buprenorphine for KD. OARRS reports for KD prescriptions have not been admitted into evidence. 6/22/2023 at 3:22 p.m. Thank you.

This is the first question they've had. I'm going to let them go. I'm going to let them continue to deliberate as long as they need to deliberate. Thanks.

(Recess taken at 3:22 p.m. to 5:10 p.m.)

(Jury in at 5:10 p.m.)

THE COURT: Apparently didn't think it was important enough to be here for this.

Has the jury reached a verdict?

A JUROR: We have, Your Honor.

THE COURT: Will you please pass the verdict forms to Ms. Kacsor.

Verdict on Count 1 is guilty. Count 2 is guilty. Count 3 is guilty. Count 4 is guilty. Count 5 is guilty. Count 6 is guilty. Count 7, guilty. Count 8, guilty. Count 9, guilty. Count 10, guilty. Count 11, guilty. Count 12, not guilty. Count 13, not guilty. Count 14, not guilty.

Juror No. 1, are these your verdicts?

JUROR NO. 1: Yes, but is there a 15?

THE COURT: There is. Not guilty.

Are these your verdicts?

JUROR NO. 1: Yes.

THE COURT: Juror No. 2, are these your verdicts?

JUROR NO. 2: Yes, Your Honor.

THE COURT: Juror No. 3, are these your verdicts?

JUROR NO. 3: Yes.

THE COURT: Juror No. 4, are these your verdicts?

JUROR NO. 4: Yes.

THE COURT: Juror No. 5, are these your verdicts?

JUROR NO. 5: Yes.

THE COURT: Juror No. 6, are these your verdicts?

JUROR NO. 6: Yes.

THE COURT: Juror No. 7, are these your verdicts?

JUROR NO. 7: Yes.

THE COURT: Juror No. 8, are these your verdicts?

JUROR NO. 8: Yes.

THE COURT: Juror No. 9 are these your verdicts, sir?

JUROR NO. 9: Yes.

THE COURT: Juror No. 10, are these your verdicts?

JUROR NO. 10: Yes, Your Honor.

THE COURT: Juror No. 11, are these your verdicts?

JUROR NO. 11: Yes, sir.

THE COURT: Juror No. 12, are these your verdicts?

JUROR NO. 12: Yes, Your Honor.

THE COURT: Thank you. The defendant should have been here. The Court is going to order -- issue a warrant for his arrest and, ladies and gentlemen, with the Court's thanks, you are excused from any further obligation under your jury summons. Thank you. If any of you would like to talk, stay back there.

(Jury out at 5:11 p.m.)

THE COURT: Would anyone like to see the verdict forms?

MR. O'BRIEN: Yes.

THE COURT: Ladies, thank you. You're excused as well. Appreciate it.

(Alternate jurors excused.)

THE COURT: There will be a sentencing date. What's your position on remand?

MR. LANDRY: Can we have half a second, please, Your Honor?

MS. STAGIAS: Your Honor, based on the fact that the defendant is not currently here, we would ask for a remand.

THE COURT: If he shows up in the next 30 minutes --

MR. O'BRIEN: He will be here. Sorry.

THE COURT: If he shows up in the next 30 minutes, what's your position?

MS. STAGIAS: Your Honor, the statute states that the defendant shall be remanded, but we would defer to the Court. We would also ask that if he is placed back on his bond conditions that the additional bond condition be added that he not be allowed to practice medicine.

THE COURT: I didn't realize he was still practicing medicine.

MR. O'BRIEN: He's not, Your Honor. He is -- he agreed not to write any prescriptions as part of a condition of his bond. And he has not practiced medicine for a year, at least he has not issued any prescriptions that I know of. I don't know if he's actually practicing medicine in any capacity.

THE COURT: Is he doing anything with aesthetics?

MR. O'BRIEN: He might be, yeah. I don't know that that's a medical practice. But he will be here within a half an hour, Your Honor. I would ask that he not be remanded.

He's in good faith complied with all conditions of his bond. He has tendered his passport.

THE COURT: He has surrendered his passport?

MR. O'BRIEN: Yes, he has. He's done everything asked of him by this Court. And it's my fault that he's not here, Your Honor. I don't want -- if you want to blame somebody, you can blame me for that.

THE COURT: I'll need to amend my standing orders. Thank you.

MR. O'BRIEN: Thank you, Your Honor.

(Recess taken at 5:13 p.m. to 5:35 p.m.)

THE COURT: Doctor, I don't know who told you that you didn't have to be here, but you didn't even show up for the second day of deliberations.

THE DEFENDANT: I thought I was told you have to be --

MR. O'BRIEN: I was not clear, Your Honor. That is my fault.

THE DEFENDANT: I didn't know.

MR. O'BRIEN: In my experience, usually, we don't have to stay in the courthouse, but we have to be close by. And I was not clear with my client that he should be very close by and waiting for the deliberations so that we can proceed. But that was my fault.

THE COURT: There is a presumption of detention because you've been convicted on eleven counts. Let the record

reflect that we took the verdict at 5:05 and it's 5:35 at this point. And the jury's been dismissed. I should lock you up tonight.

THE DEFENDANT: I didn't know.

MR. O'BRIEN: That is my fault, Your Honor, that he was not here at that time.

THE DEFENDANT: I could not have been --

THE COURT: I'm going to order a presentence investigation. You'll cooperate in that presentence investigation. You'll have an opportunity to object to any of the findings, as will the government. And we'll be here for sentencing 45 to 60 days from now.

MR. O'BRIEN: Yes, Your Honor.

THE COURT: I'll withdraw the warrant at this point. But don't ever take me for granted again. Thank you. That will be all.

MR. O'BRIEN: Thank you, Your Honor.

(Proceedings concluded at 5:37 p.m.)

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C E R T I F I C A T E

I, Lahana DuFour, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Michael H. Watson, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Lahana DuFour
Lahana DuFour, RMR, CRR
Official Federal Court Reporter
August 1, 2023